



December 12, 2000

Mr. Paul W. Hunn
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
511 E. John Carpenter Freeway, Suite 430
Irving, Texas 75062

OR2000-4681

Dear Mr. Hunn:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 142061.

Tom Bean Independent School District (the "school district") purportedly received a request for several types of information pertaining to the school district's adoption of a drug testing policy and the research and findings that lead to the adoption of this policy. You claim that a portion of the requested information is not "public information" under the Public Information Act as it falls under section 552.027 of the Government Code. In addition, you claim that the requested information is excepted from disclosure under sections 552.026, 552.101, 552.103, and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin with your argument that some of the submitted information does not qualify as "public information" under the Public Information Act because it falls under section 552.027. Section 552.027 of the Government Code provides:

(a) A governmental body is not required under this chapter to allow the inspection of or to provide a copy of information *in a commercial book or publication purchased or acquired by the governmental body for research purposes* if the book or publication is commercially available to the public.

(b) Although information *in a book or publication* may be made available to the public as a resource material, such as a library book, a governmental body is not required to make a copy of the information in response to a request for public information.

(c) A governmental body shall allow the inspection of information *in a book or publication* that is made part of, incorporated into, or referred to in a rule or policy of a governmental body.

[Emphasis added]. This section is designed to alleviate the burden of providing copies of commercially available books, publications, and resource materials maintained by governmental bodies, such as telephone directories, dictionaries, encyclopedias, statutes, and periodicals. The legislative history of this provision notes that section 552.002 should exclude from the definition of public information

books and other materials that are also available as research tools elsewhere to any member of the public. Thus, although *public library books* are available for public use, the library staff will not be required to do research or make copies of books for members of the public.

INTERIM REPORT TO THE 74TH LEGISLATURE OF THE HOUSE STATE AFFAIRS COMM., 74th Leg., R.S., SUBCOMMITTEE ON OPEN RECORDS REVISIONS 9 (1994) (emphasis added). Therefore, section 552.027 may exclude commercially available research material from the definition of "public information." However, if any information in a book or publication is "made part of, incorporated into, or referred to in a rule or policy of" the district, the district must allow inspection of that information. Gov't Code § 552.027(c).

The information that you argue falls outside of the Public Information Act pursuant to section 552.027 consists mainly of information obtained from internet web sites, along with two short articles copied from journals, a newspaper article, and a legal opinion copied from a case reporter. The subject matter of these documents indicates that the school district acquired them in regard to its adoption of a drug testing policy. Due to the fact that these materials are not typical of the sort of information that normally falls under section 552.027, and due to the connection between these materials' subject matter and the school district's drug testing policy, we do not consider these materials to fall within the ambit of section 552.027. Accordingly, we find that these materials constitute "public information" that is subject to the Public Information Act. *See* Gov't Code § 552.002.

Having found that all of the submitted information is subject to the Public Information Act, we turn to the Act's procedural requirements. Section 552.301 of the Government Code dictates the procedure that a governmental body must follow if it wishes to ask the attorney general for a decision determining whether requested information falls within an exception to disclosure. Among other requirements, the governmental body, "no later than the 15th business day after the date of receiving the written request," must submit to the attorney general "a copy of the written request for information." Gov't Code § 552.301(e)(1)(B). If the governmental body fails to fulfill this requirement, the requested information "is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." Gov't Code § 552.302.

You seem to state that the school district received the request for information on September 21, 2000.¹ Accordingly, the school district's deadline for submitting the request for information to this office expired fifteen business days later on October 18, 2000. *See* Gov't Code § 552.301(e)(1)(B). However, as of the date of this ruling, this office has yet to receive the request for information.² Therefore, the school district has missed its fifteen-day deadline as prescribed by section 552.301. Consequently, absent a compelling reason to withhold the requested information, the information must be released. *See* Gov't Code § 552.302.

This office has held that a compelling reason exists to withhold information when the information is confidential by another source of law. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). One argument you raise is that the submitted information is excepted under section 552.103 of the Government Code. However, that section is a discretionary exception under the Public Information Act and not a confidentiality provision. *See* Open Records Decision No. 473 at 2 (1987) (discretionary exceptions under the Public Information Act can be waived). Therefore, your argument concerning section 552.103 does not provide a compelling reason to withhold the submitted information. You also claim that the submitted information is confidential by law under the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. Because you claim that portions of the submitted information are confidential by another source of law, we will address this argument.

The school district has redacted from the submitted documents information that it claims falls under FERPA. In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA, and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. Consequently, the school district must withhold the information that it has identified as confidential under FERPA. Furthermore, it must withhold additional information that we have identified as the type of information also made confidential by FERPA.

¹It is unclear from your statement whether September 21, 2000 is the date the request for information was sent to the school district or received by the school district. *See* Gov't Code § 552.301(e)(1)(C).

²For clarity we note that in your letter requesting an attorney general decision, you refer to Tabs A, B, and C. While we did receive the information you describe as being behind Tab C, we did not receive the materials described as being behind Tab A or B, nor did we receive any labeled tabs at all.

Finally, we note that some of the submitted information may be subject to copyright law. We are mindful that a custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). However, a governmental body *must allow inspection* of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990). Therefore, under the Public Information Act, the school district has no obligation to provide the requestor with a copy of the copyrighted materials, but the school district must allow the requestor to inspect such materials. Should the requestor wish to make copies of these materials, he must do so unassisted by the school district and he must assume the duty of compliance and the risk of infringement in regard to copyright law

In conclusion, the school district must release the submitted information to the requestor with two exceptions: 1) the student record information must be withheld under FERPA; and 2) in regard to any submitted information which is subject to copyright law, the school district must allow inspection of that information rather than release copies to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor

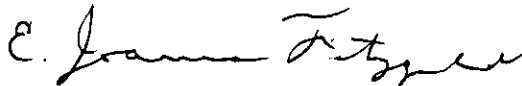
should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



E. Joanna Fitzgerald
Assistant Attorney General
Open Records Division

EJF\er

Ref: ID# 142061

Encl: Submitted documents

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(w/o enclosures)